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Supreme Court, U.S.
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No. 04-1260

UNITED STATES SUPREME COURT

CITY OF PORTLAND,

Petitioner,

vs.

QWEST CORPORATION,

Respondent.

BRIEF OF AMICUS CURIAE VERIZON NORTHWEST INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT QWEST CORPORATION

Verizon Northwest Inc.
Thomas R. Parker
Charles H. Carrathers
600 Hidden Ridge
HQE03J43
Irving, Texas 75015
972-718-2415

GRAHAM & DUNN PC
Judith A. Endejan*
Pier 70
2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121
206-624-8300

Attorneys for Amicus Curiae
Verizon Northwest Inc.

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INTEREST OF AMICUS CURIAE[1]

Verizon Northwest Inc. ("Verizon Northwest") is part of Verizon Communications Inc., one of the nation's largest companies, providing local exchange telephone service, long distance calling and wireless services through one or more subsidiaries in 50 states. Verizon Northwest has advocated against the burdensome type of rights-of-way fees and regulations imposed by the cities in this case. It appeared as an Amicus Curiae at the district court and circuit court of appeals in support of Respondent Qwest Corporation ("Qwest").

Verizon Northwest is Oregon's second largest incumbent local exchange carrier ("ILEC"), serving over one-half million local exchange lines, including lines within the City of Portland ("City").

The City's regulations at issue here apply to Verizon Northwest as well as Qwest. These burdensome regulations adversely affect Verizon Northwest's ability to offer telecommunications services and the company has an interest in their invalidation upon remand.

I. SUMMARY OF ARGUMENT

No compelling reason exists to grant certiorari in this case. First, there is no split of authority among the federal Circuit Courts of Appeal on the § 253 issue raised by the City. Indeed, these courts have uniformly endorsed the § 253 analysis of the

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[1] This Brief is submitted pursuant to Supreme Court Rule 37(2)(a) with the written consent of the parties.

Ninth Circuit. Second, this analysis is not inconsistent with the rulings of either this Court or the Federal Communications Commission ("FCC"). Finally, and most important, the City's Petition is not ripe for review because the Ninth Circuit remanded the case back to the district court for further findings that could obviate the need for further review. Absent any uncertainty in the law, and in light of the prematurity of the case, this petition is a poor candidate for certiorari.

II. THE COURT SHOULD DENY THE CITY'S PETITION FOR WRIT OF CERTIORARI.

A. This Case Does Not Meet the Criteria For a Grant of Certiorari.

Supreme Court Rule 10 provides three general considerations for review on certiorari, emphasizing that "A petition for writ of certiorari will be granted only for compelling reasons." [2] None exists here.

First, the petition raises no conflict between decisions of the federal Circuit Courts of Appeal. Remarkably, the petition fails to cite *City of Auburn v. Qwest*, 260 F.3d 1160 (9th Cir. 2001) ("*Auburn*"), which established the interpretation of § 253(a) the City challenges here, *City of Portland v. Qwest*, 385 F.3d 1236 (9th Cir. 2004) ("*Portland*"). This case simply reaffirms *Auburn, id.* at 1241. No other Circuit has contradicted *Auburn's* ruling that § 253(a) can preempt regulations that may have the effect of prohibiting the provision of telecommunications services. Indeed, other Cir-

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[2] The criteria in Rule 10(b) are inapplicable as it applies to state court rulings.

cuit Court cases (again ignored by the City) have interpreted § 253(a) consistent with *Auburn*. *See, e.g., RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) (an absolute bar on provision of services is not required); *Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258, 1270-72 (10th Cir. 2004) (cumulative effect of regulations can be prohibitive); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (prohibition does not need to be complete or insurmountable to run afoul of § 253(a)); *Bell South Telecoms. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1186 (11th Cir. 2001) (§ 253 prohibits regulations that "may prohibit or have the effect of prohibiting ... telecommunications service.").

Furthermore, three of the cities that were parties to *Auburn* filed a petition for a writ of certiorari with this Court, raising the identical issue regarding § 253(a) that the City re-argues here. This Court denied certiorari to the *Auburn* cities in *City of Tacoma, City of Auburn, and City of Des Moines v. Qwest Corp.*, 534 U.S. 1079, 122 S. Ct. 809, 151 L. Ed. 2d 694 (2002). While denial of certiorari does not constitute an expression on the merits, such denial informs the Court that the criteria for certiorari were not met in *Auburn*. The City does not point to any change in the law, or any other reason that would justify review of an issue the Court determined was not worthy of certiorari.

Second, *Portland* is not inconsistent with relevant decisions of this Court or the Federal Communications Commission. The suggestion that *Portland* is in conflict with *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S. Ct. 1555, 158 L. Ed. 2d 291 (2004) is wrong. *Nixon* did not address the question of whether municipal regulation of telecommunications carriers can be pre-

empted "even if they do not advertise their prohibitory agenda on their faces." 541 U.S. at 127. *Nixon* instead addressed the question of whether Congress intended § 253(a) to preempt a state statute prohibiting a municipal entity from entering the telecommunications business. In *Nixon,* the Court found that § 253(a) did not interfere with state/municipal relationships. It does not conflict with *Auburn*, which concerns preemptive limits on the substantive regulations themselves.

The City also suggests erroneously that *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999) is inconsistent with *Portland.* In that case, the Court noted:

> The Telecommunications Act of 1996 ("1996 Act" or "Act"), Pub. L. No. 104-104, 110 Stat. 56, fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry.

525 U.S. 366 at 726. *AT&T Corp.* dealt with an entirely different provision, 47 U.S.C. § 251(d)(2)(B), which defines an incumbent local exchange company's duties to new entrants. This provision does not address the separate limitation on local regulation in § 253. Thus, *Auburn* is consistent with *AT&T Corp.* because both contain limits on state and local regulation of telecommunications companies. Furthermore, the cities also argued unsuccessfully that *AT&T Corp.* supported their view of § 253(a) in their recently-failed Petition for Writ of Certiorari in *Auburn.* The Tenth Circuit addressed this same argument in *Qwest v. City of Santa Fe, supra*, noting that while not every in-

crease in cost creates a prohibition under § 253, "it is enough that the ordinance would 'materially inhibit the provisions of services.'" 383 F.3d at 1271.

Finally, the City mischaracterizes FCC decisions that simply mirror the language of § 253(a), which is phrased in the alternative of proscribing requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The first FCC reference, "Suggested Guidelines for Petitions for Ruling Under § 253 of the Communications Act," 13 FCCR 22,970 (1998), does not define the meaning of an "effective prohibition." In the next cited decision, *In re State of Minnesota*, Petition for a Declaratory Ruling, 14 FCCR 21,697 (1999), the FCC addressed a petition for declaratory ruling from the State of Minnesota, asking the Commission to find that an exclusive agreement with a developer exchanging exclusive access to rights-of-way for fiberoptic transport capacity was consistent with § 253. Again, the FCC simply reiterated the express language of § 253, noting:

> Based on the current record, we cannot endorse this agreement as requested by Minnesota. Minnesota fails to demonstrate that the agreement neither prohibits nor has the effect of prohibiting the provision of competitive telecommunications services by certain entities. To the contrary, the agreement appears to have the potential to adversely affect the provision of the telecommunications services by facilities-based providers, in violation of the provisions of § 253(a). (Emphasis added.)

Finally, the last authority, *In re California Payphone Association*, Petition for Preemption, 12 FCCR 14,191 (1997), proves that the FCC distinguishes between actual prohibition and effective prohibition, both of which are precluded by § 253(a). In discussing how to determine effective prohibition, the FCC noted:

> We consider whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

In re California Payphone Association, 12 FCCR 14,191 at ¶ 31.

The FCC does not require actual proof that a provider cannot provide a service, contrary to the City's arguments.

Thus, the City has failed to establish that the Ninth Circuit in *Portland* decided a question that should be settled by this Court or that conflicts with any relevant decisions of this Court. Indeed, as explained in the next section, this case would be a poor vehicle for this Court to construe § 253(a).

B. The City Mischaracterized the Ninth Circuit's Holding in Both *Portland* and *Auburn*, as well as the Factual Background of the Instant Case.

The City mischaracterizes the underlying Ninth Circuit holding at issue in its Petition. The City peppers its Petition with claims that the Ninth Circuit's decision would preempt local regulations "under the specter of mere speculation that they might in the future produce the effects the statute

proscribes." Petition at 3. Yet, *Auburn*, upheld in *Portland*, authorizes no such result. In both cases, Qwest challenged the ordinances of various Oregon and Washington cities that purported to regulate telecommunications carriers' use of the rights-of-way. These ordinances required, among other things, a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, and "such other information as may be requested by the cities." After application, some cities required a public hearing before granting a franchise. Also, the ordinances regulated the transfer of ownership of facilities, and some imposed noncost-based fees for use of rights-of-way (particularly in Oregon). Finally, the ordinances permitted the cities to revoke franchises and even remove the company's facilities. After examining these provisions, the Ninth Circuit concluded in *Auburn* that, "taken together, these requirements 'have the effect' of prohibiting Qwest and other companies from providing telecommunications services." 260 F.3d at 1176. The Ninth Circuit found that ordinances such as those at issue in *Auburn* created a regulatory structure that had an impermissible prohibitive effect. As such, unless saved by the safe harbor provision contained in § 253(c), such ordinances would violate § 253(a).

The *Auburn* court felt the record presented "pure issues of law" that allowed it to consider the merits of the challenged city ordinances under § 253. Consequently, it invalidated the ordinances at issue because they "included several features that, in combination, have the effect of prohibiting the provision of telecommunications services."

By contrast, in *Portland*, the Ninth Circuit felt that the record required remand of the challenged ordinances to the district court, noting, "The district court's general conclusion that the

City's franchise agreements and ordinances were not preempted by § 253 is not conducive to effective review on appeal." 385 F.3d at 1240. The Ninth Circuit, after reaffirming its holding in *Auburn,* noted that "The district court failed to take into consideration the cumulative effect of the City's regulatory schemes." 385 F.3d at 1241.

In light of the Ninth Circuit's ruling in *Portland,* the City's Petition inaccurately assesses the ordinances actually at issue and mischaracterizes the type of analysis the Ninth Circuit ordered in *Auburn* and *Portland.*

The City's argument also ignores basic principles of statutory construction. Congress used the disjunctive "or" to provide two alternative ways to violate § 253(a) – only one of which supports the interpretation urged by the City requiring a showing of actual prohibition. "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise. . . ." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979), *citing FCC v. Pacifica Foundation,* 438 U.S. 726, 739-740, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). To accept the City's view would ignore the separate meanings in the statute's language.

C. The Petition Should be Denied Because this Case is Not Ripe for Review.

Because the ordinances challenged in *Portland* were so extensive and had not been analyzed properly by the district court, the Ninth Circuit remanded the case to the district court to "conduct an individualized preemption analysis of each city's ordinances" under the proper application of *Auburn.* 385 F.3d at 1238. Given the remand, it is

possible that some or all of the ordinances still could be upheld. Given this contingency, the City's claim is not ripe for review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998), *quoting Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532 (1984)). If the district court upholds the subject ordinances on remand, there would be no need for the City to pursue its appeal.

This Court has addressed ripeness in this exact context and refused certiorari:

> Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The Petition for a writ of certiorari is denied. (Emphasis added.)

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co., 389 U.S. 327, 328, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967), citing *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-58, 36 S. Ct. 269, 60 L. Ed. 2d 629 (1916). Given the remand, the City's claim is no more ripe than the one this Court rejected in *Brotherhood*.

D. The City's Jurisdictional Arguments are Based Upon an Erroneous Construction of § 253.

The City's arguments regarding standing and summary judgment fail because they are based upon its erroneous suggestion that § 253 requires Qwest to show an actual prohibitive effect. The Ninth Circuit properly found that a § 253 injury could also be established by the cumulative effect of local regulation. However, because this analysis of cumulative effects will take place upon remand, the City's injury-based arguments are simply premature.

III. CONCLUSION

No compelling reason exists to grant the City's Petition for Writ of Certiorari. The Ninth Circuit's § 253(a) holdings in *Auburn* and *Portland* do not conflict with any decision of this Court, the federal Circuit Courts of Appeal or the FCC. No further construction of § 253(a) is required at this time.

DATED this 20th day of April, 2005.

GRAHAM & DUNN PC

By _____
Judith A. Endejan
WSBA# 11016
Email: jendejan@grahamdunn.com
Attorneys for Amicus Curiae Verizon Northwest Inc.